

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICKY KEELE

Claimant

VS.

HAZ MAT RESPONSE, INC.

Respondent

AND

RELIANCE INSURANCE CO.

KEMPER INSURANCE CO.

Insurance Carriers

Docket No. 255,121

ORDER

Respondent and Reliance Insurance Company administered by Western Guarantee Fund appealed Administrative Law Judge Robert H. Foerschler's Award dated July 26, 2002. The Board heard oral argument on January 22, 2003.

APPEARANCES

Richard C. Wallace of Shawnee, Kansas, appeared for the claimant. Rex Henoch of Lenexa, Kansas, appeared for respondent and its insurance carrier, Reliance Insurance Company, a bankrupt company now administered by Western Guarantee Fund. Michelle Daum Haskins appeared for respondent and its insurance carrier, Kemper Insurance Company.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Board notes that although a date of accident was listed by the ALJ in the Stipulations portion of the Award, nonetheless, the date of accident was also listed as an issue in the Issues portion of the Award. The parties agree the date of accident was a disputed issue in this case.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered accidental injury arising out of and in the course of his employment and awarded the claimant a 13 percent permanent partial scheduled disability to the right upper extremity. The ALJ entered the award against respondent and one of its insurance carriers, Reliance Insurance Company.

Respondent and Reliance Insurance Company, a bankrupt company now administered by the Western Guarantee Fund, raised the following issues on review: (1) What is the date of accident; and, (2) Which insurance carrier is liable for payment of the Award. The Western Guarantee Fund argues that the date of accident should be March 22, 2000, claimant's last day of employment with respondent. As Kemper Insurance Company was the respondent's carrier at that time, the Western Guarantee Fund concludes Kemper Insurance Company should be liable for payment of claimant's benefits.

Kemper Insurance Company argues that although claimant continued his employment with respondent until March 22, 2000, claimant was terminated due to attendance problems unrelated to his injury; therefore, there is no nexus between the claimant's last day worked and his injury. Moreover, Kemper Insurance Company argues there was no evidence that claimant's condition worsened after he returned to work following his carpal tunnel surgery. Accordingly, Kemper Insurance Company requests the ALJ's Award be affirmed.

Claimant notes that the only issue raised on review is the date of accident and adopts Western Guarantee Fund's position the ALJ's Award should be modified to reflect a date of accident of March 22, 2000.

The parties have agreed that respondent was provided workers compensation insurance coverage by Reliance Insurance Company until December 17, 1999. Thereafter, beginning on December 18, 1999, respondent's workers compensation insurance coverage was provided by Kemper Insurance Company. Therefore, the determination of claimant's date of accident will also determine whether Kemper is responsible for payment of benefits after, but not before, December 17, 1999. The date of accident is the sole issue for the Board's determination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a general laborer for respondent and in the course of his employment he operated heavy equipment as well as hand tools. In approximately April 1999, claimant experienced an onset of numbness, tingling, pain and decreased strength in his right hand and wrist. Claimant noted that working with hand tools, especially the tools that vibrated, worsened the pain, tingling and numbness in his hand.

Claimant advised respondent of the problems and sought treatment. Ultimately, claimant had a surgical right carpal tunnel release on July 22, 1999. The surgery was performed on a Friday and claimant returned to work the following Monday. Claimant performed light-duty work for approximately three weeks and then returned to his former job performing the same work activities he had performed before the surgery.

After the surgery, claimant continued to experience decreased strength and the tingling sensation in his right hand and fingers but his hand no longer had the sensation of falling asleep nor did it awaken him hurting in the night.

When claimant returned to his regular job duties the loss of strength as well as the tingling sensation in his hand stayed the same. Claimant noted that these problems were the same as before his surgery and he continued to experience the same problems through his last day working for respondent. Claimant's employment was terminated on March 22, 2000.

At the request of respondent's attorney, Dr. Michael J. Poppa performed an evaluation and examination of the claimant on July 18, 2001. Dr. Poppa rated claimant with a 10 percent impairment to the right upper extremity at the wrist. The doctor testified that claimant's return to work after surgery caused a gradual aggravation of his carpal tunnel syndrome. In response to a hypothetical question the doctor noted:

Q. Doctor, for purposes of my next few questions, assume with me the following facts: That following the right carpal tunnel surgery and the release, Mr. Keele missed two or three days of work. He then returned to work on a light duty status for approximately one to two weeks. After that, he returned to full duty for the employer, HAZ-MAT Response, Inc. When he returned to full duty, he was performing the same job and the same duties he had been performing prior to the surgery or the release. That job included repetitive or cumulative motions. It also included using vibrating tools, other types of tools, and heavy equipment and heavy machinery. Mr. Keele continued to work at that same job until or approximately March 22, 2000, at which time he was terminated. Now, assuming those facts, do you have an opinion as to whether the condition of his right carpal tunnel syndrome continued to be aggravated or exacerbated or worsened as long as he was exposed to repetitive forceful use of his right hand operating power equipment and vibrating tools and heavy machinery and performing repetitive or cumulative duties with that right hand?

A. Yes, I do.

Q. And what is your opinion?

A. My opinion is that Mr. Keele's continued employment by HAZ-MAT Response, Inc., did cause on a regular basis gradual aggravation involving his postoperative condition of carpal tunnel syndrome. That's a natural consequence of his work with the vibrating tools, repetitive duties, as you stated.¹

The doctor further noted some individuals have varying degrees of postoperative symptoms and claimant's continued numbness and tingling were indicative of continual aggravation of the median nerve. Dr. Poppa stated that individuals who have undergone carpal tunnel repair and go back to their similar positions performing the repetitive duties or working with vibratory tools will experience continued daily aggravations of that condition.

At the request of his attorney, the claimant was examined by Dr. Edward J. Prostic on June 13, 2000. Dr. Prostic concluded that claimant's right carpal tunnel syndrome was not permanently worsened following his return to work after surgery. The doctor testified:

Q. Is it your opinion that this condition [right carpal tunnel] continued to be aggravated as long as Mr. Keele was exposed to repetitious forceful use of his hands operating power equipment and other tools?

A. Up until the point of surgery.

Q. What about post-surgery, if he continued to -- I want to make sure I quote this -- have repetitious forceful use of hands operating power equipment and other tools?

MR. WALLACE: After the surgery you mean?

MR. HENOCH: Yes.

A. I don't believe there is any permanent change in his hands following successful rehabilitation from the surgery for the carpal tunnel syndrome.²

The doctor further testified:

¹ Poppa Depo. at 9-10.

² Prostic Depo. at 9-10.

Q. Again, you didn't have any information that would cause you to feel that the claimant had aggravated, exacerbated, or accelerated his carpal tunnel symptoms post-surgery, do you?

A. It is my opinion that if he had aggravated his wrist after surgery he would have had recurrent numbness, tingling, swelling, and other complaints rather than weakness. The weakness is a problem after carpal tunnel release surgery. In some cases it's profound. In most of the cases it's mild or temporary. And in his, it is fairly significant and long-lasting.³

But the doctor noted that when he examined claimant the only complaint regarding the right hand was residual weakness. The doctor was then asked that if claimant later exhibited the other symptoms would that change his opinion and the doctor responded that it was possible but not likely.

Q. If he had any of other complaints that you indicated, numbness, tingling, whatever, besides the weakness, would that change your opinion regarding involvement of his work duties post-surgery?

A. It is possible.

Q. In other words, that is something you would have to evaluate to make a determination one way or the other?

A. More likely that the not, I would not change my opinion.⁴

What is the date of accident for this repetitive micro-trauma injury?

Following creation of the bright line rule in the 1994 *Berry*⁵ decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,⁶ which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's

³ Id. at 12.

⁴ Id. at 13-14.

⁵ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

⁶ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.⁷

Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.⁸

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

Here, it is undisputed that after his carpal tunnel surgery the claimant was placed in an accommodated position for a few weeks and then returned to performing the same job duties that he performed before the surgery. Dr. Hood noted that performing those job duties resulted in a gradual aggravation of claimant's right carpal tunnel syndrome. Although Dr. Prostic expressed a contrary opinion, it is significant to note that when he examined claimant his record indicated claimant was only complaining of right hand weakness. And the doctor indicated that if claimant had complaints of recurrent numbness and tingling after surgery that would be indicative of subsequent aggravation of the wrist.

The Board concludes that claimant suffered additional aggravation to his right carpal tunnel condition when he returned to the same job he had performed before his right carpal tunnel surgery. Because claimant continued to aggravate his condition after the surgery, the last day worked rule is applicable.⁹ The ALJ's decision is modified to reflect a date of accident of March 22, 2000. Consequently, the ALJ's Award is further modified to reflect that Kemper Insurance Company is responsible for the permanent partial disability benefits for a 13 percent scheduled loss of use of the right upper extremity.

⁷ Id. at Syl. ¶ 3.

⁸ Id. at Syl. ¶ 4.

⁹ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

The Board further determines that Western Guarantee Fund is responsible for payment of the medical and temporary total disability compensation benefits incurred during its period of coverage including the medical expenses for the surgery.¹⁰

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 26, 2002, is modified to reflect a date of accident of March 22, 2000. Reliance Insurance Company and Western Guarantee Fund as well as Kemper Insurance Company are ordered to pay benefits incurred during their respective periods of coverage as previously noted.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This is primarily a dispute between two insurance carriers that should not be litigated in the Division of Workers Compensation. As held in *Kuhn*,¹¹ the Award should be entered

¹⁰ Id. at Syl.¶ 9.

¹¹ *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968).

jointly and severally against both carriers, leaving them to litigate their grievances in a separate proceeding brought for such purpose.

In *Kuhn*, the injured employee injured his back on three separate occasions. Between the second and third injuries, respondent changed insurance carriers. Comparing the injured worker to “the ham in the sandwich,” the Kansas Supreme Court noted that a primary purpose of the Workers Compensation Act is to provide compensation to injured employees with minimum delay. Accordingly, the Court held that disputes between insurance carriers concerning their respective liabilities for the payment of compensation should not be litigated in workers compensation proceedings. The Supreme Court stated, in part:

The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. We deduce from the trial court’s judgment, that neither Reliance nor Farmers is now paying any compensation. In addition, claimant has been put to the expense of printing a brief and of employing appellate counsel, for whose necessary expenses he will no doubt be liable.

These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between them, yet their quarrels should not be resolved at the expense of an injured workman.¹²

The majority opinion states that determining the date of accident determines which insurance carrier should be responsible for the payment of claimant’s compensation. That was the same issue presented in *Kuhn*.

I also disagree that the appropriate accident date for this repetitive trauma injury is claimant’s last day of work. I believe the evidence establishes that claimant’s last day of work before the July 22, 1999 surgery is the more appropriate date. I feel the greater weight of the evidence indicates that claimant’s condition did not worsen after that surgery.

Using the last day of work before surgery is appropriate as claimant’s functional impairment was both permanent and measurable at that point in time. Claimant also was forced to leave work at that time as a direct result of the injury sustained.

¹² Id. at 171-172.

I understand the majority's difficulty in following the various bright line rules set forth by the appellate courts. Although unintended, these rules have provided insurance carriers a road map in how to manipulate a workers compensation claim. In this claim, the insurance carrier on the claim on the date of surgery had an incentive to delay payment of disability benefits hoping that claimant would return to work under circumstances that would permit it to shift liability to another carrier.

I believe the first date of accident in this claim is in July 1999 and any additional functional impairment or disability that arose after that date should be treated as a second injury.

BOARD MEMBER

- c: Richard C. Wallace, Attorney for Claimant
Rex Henoch, Attorney for Respondent & Reliance Ins. Co.
Michelle Daum Haskins, Attorney for Respondent & Kemper Ins. Co.
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director